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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH P. CARRANZA,

Defendant and Appellant.

A141850

(Alameda County
Super. Ct. No. CH54054A)

Appellant Joseph P. Carranza pled no contest to second degree murder and later moved to withdraw his plea based solely on ineffective assistance of counsel. An attorney was appointed to represent him for purposes of the motion and ultimately elected not to pursue it. Carranza later submitted a letter in support of his motion, which was denied in open court, without requiring his attorney to respond to his claims of ineffective assistance. Carranza claims on appeal it was error to deny him a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), in light of *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*). We agree and conditionally reverse the judgment to allow the court to conduct a *Marsden* hearing. If, after that hearing, the court determines Carranza was not deprived of effective representation and freely entered his plea, the judgment shall be reinstated.

PROCEDURAL BACKGROUND

The facts of the underlying homicide are irrelevant to the procedural issue before us. On July 18, 2013, Carranza pled no contest to second degree murder (Pen. Code,¹ § 187) in exchange for a sentence of 15 years to life, along with dismissal of remaining charges of pimping (§ 266h, subd. (a)) and pandering (§ 266i, subd. (a)(1)), two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and an allegation of a prior conviction for possession for sale of a controlled substance. Firearm and great bodily injury enhancements (former §§ 12022.7, 12022.5, subd. (a), 12022.53, subds. (a)–(d) & (g)) appended to the murder count were also stricken. At the time of his plea and leading up to it, Carranza was represented by attorney Maureen Kildee.

On November 4, 2013, Carranza filed a handwritten motion in pro per to withdraw his plea on grounds of ineffective assistance of counsel. His moving papers included his own declaration that he had requested from Kildee investigative reports on the crime from the first day she began representing him, and he did not receive any reports until a month after he had entered his plea of no contest. He claimed he had found in the partial report she finally did provide new evidence that would be useful to his defense. He claimed his trial was set too soon for him to prepare his defense because a co-defendant refused to waive time. He asked Kildee if there was anything she could do to postpone the trial and she said there was not. Carranza claimed he later discovered through his own research that she could have filed a severance motion. When asked why she did not, Kildee said she was unaware of that possibility. Carranza's papers may be read as implying that Kildee was not prepared to go to trial and coerced him into a plea deal because of her unpreparedness. Carranza also claimed that in the weeks leading up to trial, Kildee had encouraged him about the prospects of going to trial, predicting he would receive a manslaughter verdict. Then suddenly, five days before the scheduled trial, Kildee conveyed to him the prosecution's offer of 15 years to life and urged him to take the deal, claiming she had found some information in the discovery materials that

¹ Statutory references are to the Penal Code.

would cause him to lose the trial, with the result that Carranza faced a maximum term of 56 years to life. Carranza wanted some time to think over the offer, but Kildee told him she needed his answer immediately so she could respond to the district attorney's offer or it would be taken off the table. The declaration was accompanied by a memorandum of points and authorities. The court appointed new counsel, Ernesto Castillo, to represent Carranza on the motion.

On January 31, 2014, a different attorney, appearing specially for Castillo, reported that Castillo would "not be pursuing the motion[,] so his request at this time is to withdraw and to allow the case to proceed to sentencing with Ms. Kildee." The court granted Castillo's motion to withdraw. Carranza informed the court he "would like to still proceed with" the motion to withdraw his plea based on ineffective assistance of counsel. The court set a hearing and sentencing for March 28, 2014, and informed Carranza that Kildee would once again be representing him.

On March 28, 2014, Carranza filed an additional handwritten letter in support of his motion to withdraw his plea. In it he restated the foregoing grounds for his request, reiterating his complaints about Kildee's performance. He added that, after he had entered his plea, his father had hired an attorney for him. That attorney had investigated Kildee's performance and learned that Kildee was unaware that she might have obtained a continuance or a severance through a proper motion. (See *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501–502.)

The court denied Carranza's motion to withdraw his plea. It found "the defendant's plea was made knowingly, intelligently and voluntarily. He was adequately advised. There was no failure to adequately defend Mr. Carranza on behalf of Ms. Kildee." It then proceeded to sentence Carranza. Carranza's attorney announced she would not appeal on his behalf, and he filed his own timely notice of appeal.

DISCUSSION

The sole question presented is whether Carranza was entitled to a *Marsden* hearing based on the pro se motion he filed to withdraw his guilty plea because of alleged ineffective assistance of counsel. Carranza relies on *Sanchez, supra*, where the Supreme

Court held: “a trial court is obligated to conduct a *Marsden* hearing on whether to discharge counsel for all purposes and appoint new counsel when a criminal defendant indicates after conviction a desire to withdraw his plea on the ground that his current counsel provided ineffective assistance only when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ ” (*Sanchez, supra*, 53 Cal.4th at pp. 89–90.) This statement was not made in a vacuum, however. The court specifically disapproved the practice used in this case of “appointing substitute or ‘conflict’ counsel solely to evaluate a defendant’s complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea.” (*Id.* at p. 84.) Quoting the Court of Appeal’s opinion, the Supreme Court agreed that “ ‘trial courts[] should abandon their reliance on counsel specially appointed to do the trial court’s job of evaluating the defendant’s assertions of incompetence of counsel and deciding the defendant’s new trial or plea withdrawal motion. (See [*People v.*] *Eastman* [(2007)] 146 Cal.App.4th [688,] 697 [“the court cannot abandon its own constitutional and statutory obligations to make the ultimate determination itself based upon the relevant facts and law of which the court is made aware by some legally sanctioned procedure”].)’ The Court of Appeal aptly concluded that ‘[t]he proper procedure does not include the appointment of “conflict” or “substitute” counsel to investigate or evaluate the defendant’s proposed new trial or plea withdrawal motion.’ ” (*Id.* at p. 89.)

The People acknowledge the holding of *Sanchez*, and they even agree that the procedure used in this case was “specifically disapproved by the *Sanchez* court.” They nevertheless claim reversal is not required because Carranza’s pro se motion did not specifically request discharge of his current attorney and appointment of new counsel. They remind us that “[m]ere grumbling” about counsel’s performance does not trigger the right to a *Marsden* hearing. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) They rely primarily on *People v. Richardson* (2009) 171 Cal.App.4th 479 (*Richardson*), a pre-*Sanchez* case in which the defendant had a jury trial, followed by a pro se motion for a new trial, including ineffective assistance of counsel as one of several grounds. (*Id.* at p.

482.) The court, as in our case, appointed new counsel solely to review the ineffective assistance of counsel allegations, and he concluded there was “no legal basis for a motion for new trial.” (*Id.* at p. 483.) Because the defendant had not made an express request to discharge his trial counsel or for appointment of a substitute attorney, and had continued to communicate with his trial attorney in a manner reflecting an intent that the representation would continue through sentencing, the trial court did not err in failing to hold a *Marsden* hearing. (*Id.* at pp. 484–485.) “[A] request for new trial based on a defendant’s claim of ineffective assistance of counsel does not trigger the court’s duty to conduct a *Marsden* hearing if the defendant’s desire for substitute counsel is not made clear.” (*Id.* at p. 484.)

Sanchez, too, refused to reduce the *Marsden* standard to a triggering event more lenient than the “ ‘clear indication’ ” of a desire for a “ ‘substitute attorney,’ ” disapproving several Fifth District Court of Appeal cases that had “incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant, either personally or through current counsel, that the defendant ‘wants a substitute attorney.’ ”² (*Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.) Thus, Carranza’s

² The cases disapproved had held a defendant’s request that his trial attorney file a new trial motion on the basis of ineffective assistance of counsel was sufficient to “put a trial court on notice of his [or her] request for a *Marsden* hearing.” (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367; accord, *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1086.) *Sanchez* also disapproved *People v. Eastman, supra*, 146 Cal.App.4th 688 insofar as it could be read as holding that a motion to withdraw a guilty plea on the basis of ineffective assistance of counsel would entitle a defendant to a *Marsden* hearing, even if not accompanied by a request for substitute counsel. (*Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.) In *Eastman* defense counsel did ask for appointment of a new attorney to assess the merits of the motion to withdraw the plea (*People v. Eastman, supra*, at p. 690), but the Fifth District did not emphasize that fact in concluding the defendant was entitled to a *Marsden* hearing and implied a *Marsden* hearing is required whenever a defendant “complains about the adequacy of appointed counsel.” (*Id.* at p. 695.) The Supreme Court also cited *Eastman* with approval, as quoted above. The facts of *Eastman* and *Sanchez* both are close to the facts of the case before us, and in both cases the courts held the defendant was entitled to a *Marsden* hearing and conditionally reversed the judgment.

filing of the motion was not alone sufficient to trigger his right to a *Marsden* hearing, but he was entitled to a *Marsden* hearing if he also asked for new counsel.

The parties' disagreement therefore boils down to whether Carranza gave a " 'clear indication' " that he wanted a " 'substitute attorney.' " (*Sanchez, supra*, 53 Cal.4th at pp. 89–90.) We find he did. The People erroneously argue that Carranza "failed to ask for a new attorney." In his memorandum in support of his motion to withdraw his plea, Carranza cited *People v. Garcia* (1991) 227 Cal.App.3d 1369, 1377, disapproved in *People v. Smith* (1993) 6 Cal.4th 684, 696, for the proposition that "[w]hen defendant seeks to withdraw plea on grounds of ineffective representation, court should elicit reasons and, if defendant presents colorable claim, *appoint new counsel to investigate and present motion.*" (Italics added.) We construe that as a request to follow such a procedure in Carranza's case. True, he requested new counsel only for purposes of representing him on the motion to withdraw his guilty plea, but that was enough. Carranza's request was similar to the request made by the defendant's attorney in *Sanchez*, which the Supreme Court found sufficient to require a *Marsden* hearing. " '[T]he trial court's duty to conduct a *Marsden* hearing was triggered by defense counsel's *request for appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on [defendant's] behalf* based on 'alleged incompetence of counsel.' " (*Sanchez, supra*, 53 Cal.4th at p. 86, italics added; see *id.* at p. 90, fn. 3 [expressing approval of this aspect of the Court of Appeal's opinion].) Carranza's request was as explicit—and as limited in scope—as that found to be adequate in *Sanchez*, and the procedure dictated by *Sanchez*, not *Garcia*, should have been followed. That Carranza asked for an improper remedy does not excuse the court's failure to follow the correct procedure.

The People suggest that the hearing on March 28, 2014, in fact amounted to a *Marsden* hearing, but the court simply found inadequate reason to require counsel to respond to Carranza's accusations. Nothing in the record convinces us the trial court consciously understood it was ruling on a *Marsden* motion, especially since it followed

the disapproved approach of appointing a separate attorney to assess Carranza's complaints. We therefore follow the approach approved by the Supreme Court in *Sanchez* as the "proper disposition" in these circumstances by conditionally reversing the judgment and remanding with directions. (*Sanchez, supra*, 53 Cal.4th at pp. 92–93.)

DISPOSITION

The judgment is reversed and the cause is remanded to the superior court with the following directions: (1) the court shall hold a hearing on Carranza's *Marsden* motion concerning his representation by counsel prior to the entry of his plea; (2) if the court finds that Carranza has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or Carranza's *Marsden* motion is denied, the court shall reinstate the judgment.

Streeter, J.

We concur:

Reardon, Acting P.J.

Rivera, J.